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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1153

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM GREEN CONSTRUCTION COMPANY, INC. and UNITED STATES FIDELITY & GUARANTY COMPANY,
Respondents.

AMICUS CURIAE BRIEF OF ST. PAUL FIRE AND MARINE INSURANCE COMPANY IN OPPOSITION TO THE PETITION OF THE UNITED STATES OF AMERICA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Statement of Interest of St. Paul Fire and Marine Insurance Company

This brief is filed with the consent of the parties pursuant to Rule 42(1) of this Court. The letters of consent have been filed herewith.

We represent St. Paul Fire and Marine Insurance Company ("St. Paul"). The decision below[1] directly affects

1. *William Green Construction Company, Inc. and United States Fidelity and Guaranty Company* v. *United States*, —— Ct. Cl. ——, 477 F.2d 930 (1973).

the interests of St. Paul, and this brief respectfully is submitted to advise this Court of St. Paul's interests in this matter, and respectfully to urge, for the reasons set forth below, that the petition of the Government for a writ of certiorari be denied.

St. Paul, as surety, issued Miller Act performance and payment bonds on behalf of William Green Construction Company, Inc. ("Green"), as principal, to the Government, as obligee, in connection with Green's contract with the Government for the construction of the National Training School for Boys, Morgantown, West Virginia ("Training School contract"). Upon the termination for default by the Government of the Training School contract, St. Paul, under a written "Takeover Agreement" with the Government, arranged for the completion of the Training School contract by another contractor. St. Paul has sustained a substantial loss under its bonds for excess completion costs and labor and material claims.

The Court of Claims held, below, that if St. Paul, as surety on the Training School contract, had sustained a loss under its bonds, it was entitled to an equitable adjustment under the contract. The Court of Claims held:

> "What we have said as to the FOB contract controls the Training School agreement. USF&G was not surety for that work and the petition therefore does not ask for recovery of amounts expended by the other surety (which is not a plaintiff here). But if the other surety has a claim, through Green, with respect to completion of the Training School comparable to that of USF&G for completion of FOB, the Training School equitable adjustment should take account of it if presented." (*Green* v. *U. S.*, *supra* note 1, at 938)

Following the decision of the Court of Claims below, an appeal, on behalf of Green and St. Paul, from the termination for default of the Training School contract was filed with the General Services Board of Contract Appeals. Proceedings on that appeal, however, have, in effect, been suspended pending the determination of this petition.

ARGUMENT

Certiorari is inappropriate to consider mere technical objections to a manifestly equitable decision of narrow application.

It respectfully is submitted that the Government's petition should be denied because

(1) the decision of the court below does not give rise to any "special and important reasons" as required for review by this Court (U. S. Sup. Ct. Rule 19(1)); and

(2) the granting of certiorari would involve this Court in an attempt by the Government to avoid, on purely technical and procedural grounds, the consequences of its admittedly mistaken conduct.

The decision below is nothing more than a fair and equitable resolution of a unique set of circumstances. It is a decision of very narrow application and not, as the Government claims (Gov't. Pet., p. 9), an expansion of the jurisdiction of the Court of Claims or an attack on the administrative disputes settlement process.

The essence of the decision below is that the Government will not be permitted, on technical and procedural

grounds, to avoid paying compensation to those whom it injures by its mistaken conduct. It seems evident that not only are there no "special and important reasons" for review, but on the contrary, that there are "special and important reasons," *viz.*, fairness and equity, to allow the decision to stand.

The "Question Presented" by the Government (Gov't. Pet., p. 2) involves technical points designed merely to overcome responsibility for admittedly mistaken conduct on its part. It seems unarguable that the admitted wrongful termination of the Howard University contract, coupled with the subsequent threats of set-off, which forced the termination of the FOB and Training School contracts which were then in progress, constitute actionable wrongs.

However, instead of seeking ways to ameliorate the impact of its conduct, the Government has sought to avoid its responsibility by retreat into the maze created by the confusion as to whether a particular claim of a government contractor is "under the contract" or for "breach". (*See, Green* v. *U.S., supra* note 1, at 937.) The Government, by first arguing before the General Services Board of Contract Appeals that the instant claims were "breach" claims not cognizable by the Board, and now by arguing that the claims should have been determined administratively, seeks to avoid the substance of the case, although it is apparent that, procedural jousting aside, fairness requires that the Government be held accountable in damages for its conduct in this case.

Those dealing with the Government have a right to expect fair dealing. *See, S&E Contractors* v. *United States,*

406 U. S. 1, 10. This is especially true as respects disputes arising out of government contracts where the Government is not only a contracting party, but also the arbiter of contract disputes. *See, United States* v. *Wunderlich,* 342 U.S. 98, 101-103 (Douglas and Reed, and Jackson, JJ., dissenting). Any definition of fair dealing must include the concept that the Government ought not to be relieved of the consequences of its admittedly mistaken conduct solely on dubious technical or procedural grounds, even assuming, *arguendo,* that there might be some colorable basis for its contentions.

It respectfully is submitted that certiorari is not intended for review of such technical objections to a manifestly fair decision of particular application. In any event, the Court of Claims was well within its authority in sweeping aside the Government's procedural objections as is amply shown in the brief of the respondents in opposition to the petition. Apart from the clear equity and legal soundness of the decision of the Court of Claims, it respectfully is submitted that, in view of the special circumstances of this case, *viz.,* Green's forced default on the Training School contract, there really was no "dispute concerning a question of fact arising under this contract" and thus no true "final decision" of the Contracting Officer.[2] Accordingly, an appeal pursuant to the disputes clause was not indicated and the Government's contentions that the failure to follow the technical requirements of the disputes clause was fatal are inapposite.

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2. The "Disputes" clause of the Training School contract is set forth in full in the Government's petition, fn. 4, pp. 9-10.

Summary

The Court of Claims was correct, and fair, in sweeping aside the technical-procedural arguments resorted to by the Government in an attempt to avoid compensating Green and its sureties for damages clearly and unequivocally connected to the Government's admitted mistaken termination of the Howard University contract, its undisputed threats of set-off on the FOB and ~~its~~ Training School contracts which were both then in progress, and its termination of those contracts. Further, certiorari should not be available to review a manifestly fair decision of narrow applicability solely on technical-procedural grounds.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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